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FEDERAL MARITIME COMM  
November 16, 2004

DELIVERED BY HAND

Mr. Bryant L. VanBrakle  
Secretary  
Federal Maritime Commission  
800 North Capitol Street, NW  
Room 1046  
Washington, DC 20573-0001

Re: FMC Docket No. 04-12  
Non-Vessel-Operating Common Carrier Service Arrangements

Dear Mr. Van Brakle:

Transmitted herewith for filing in the above-docketed proceeding are an original and fifteen (15) copies of the Comments of the International Shippers' Association.

Respectfully submitted,

INTERNATIONAL SHIPPERS'  
ASSOCIATION

By Alan F. Wohlstetter  
Alan F. Wohlstetter  
Its General Counsel

ORIGINAL

BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 04-12

NON-VESSEL OPERATING COMMON CARRIER SERVICE  
ARRANGEMENTS

COMMENTS OF THE INTERNATIONAL SHIPPERS' ASSOCIATION

The International Shippers' Association (ISA) respectfully submits these comments in response to the Federal Maritime Commission's proposed rule exempting NVOCCs from the tariff publication requirements of the Shipping Act of 1984, 46 U.S.C. App. §1707(a), for the limited purpose of allowing them to enter into service agreements (NSAs) with shippers under terms and conditions similar to those governing service contracts of vessel operators.

ISA and Its Position

ISA is a shippers' association, as defined at 46 U.S.C. App. §1702(22), whose membership consists of specialized NVOCCs which ship household goods and personal effects between the United States and overseas countries. It was formed to be able to negotiate, on behalf of its members, competitive rates and services with vessel operators and NVOCCs responsive to their members' needs. These members arrange for the packing, pick-up and movements of household goods and personal effects belonging to individual householders and employees of corporations (beneficial owners) who are moving between points in the United States and overseas points. The volume of the household goods shipments which

can be committed on behalf of ISA's membership is at present not large enough to permit ISA to negotiate competitive service contracts with vessel operators and as a result, its arrangements are made with NVOCCs at tariff rates.

At the outset we want to applaud the Commission for issuing a proposed rule which would authorize NVOCCs to enter into confidential service agreements (NSAs) instead of being bound by published tariff rates. This will encourage competition and will result in lower-than-tariff-rates to shippers, as well as more responsive service, which are proven benefits of service contracts with direct vessel operators. An important pro-competitive feature of the Commission's proposal is that the charges which will be assessed the shipper are not subject to public disclosure.

Our limited objection to the proposed rule is to the Commission's restriction prohibiting NVOCCs from entering into NSAs with another NVOCC.<sup>1)</sup> Unless this restriction is removed, or modified, the customers of ISA's members, individual householders, will be deprived of the transportation benefits of the Commission's proposed rule.

The individuals represented by ISA's members move to or from overseas points only once or twice during their lifetimes. They are clearly unsophisticated, non-repetitive shippers who have the need for the specialized skills of household

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1. We object to proposed rule 531.3 which provides: "The term [NSA shipper] does not include NVOCCs or a shippers' association whose membership includes NVOCCs."

goods NVOCCs, who also most often hold household goods freight forwarder permits from the Federal Motor Carrier Safety Administration (FMCSA) which authorize them to arrange for the required land transportation of these shipments within the United States. These specialized NVOCCs have agency agreements with local moving and storage companies, both in the United States and overseas, whose personnel come to the residence and pack the household goods and personal effects of the individual householder into cartons and specially-designed containers, using bracing to prevent damage to the items during the ocean transit. This service is not available from the conventional general commodity NVOCC. As a result, the practice in the international household goods moving industry is for the arrangements with the beneficial owner of the household goods to be made by a specialized household goods NVOCC. When the volume of a shippers' association permits it, these shipments move under service contracts with vessel operators; when it does not, they move at tariff rates.<sup>21</sup> Since ISA does not presently have the volume to enter into service contracts with vessel operators, the shipments of its members are tendered to NVOCCs for movement at tariff rates.

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2. ISA is the only household goods shippers' association located in the United States and, as stated, presently does not have the ability to obtain competitive service contracts from ocean carriers. To the best of our knowledge there is only one other shippers' association handling household goods shipments. It is Overseas Shipping Association (OSA), which is located in London, England, and caters to large household goods NVOCCs. Its members' shipments move under service contracts which OSA is able to negotiate with vessel operators because of the volume of shipments represented by its members.

As a result, unless ISA and its members are able to enter into NSAs with general commodity NVOCCs which have service contracts with vessel operators, they will be deprived of all the benefits of the proposed rule.

As we view the Commission's proposed rule, it will tend to level the playing field by generally giving small shippers and their shippers' associations, which tender their shipments directly to NVOCCs, with service contracts with vessel operators the same opportunity to negotiate confidential rates as is accorded other shippers. Unless relief is granted, the odd-man out will be the small household goods NVOCCs and their customers (individual householders) who, because of the restriction in the proposed rule, will still be required to move their shipments at published tariff rates.

Clearly, the Commission does not propose the restriction because it has concluded that the pro-competitive concept of NSAs should be withheld from any class of shippers because of differing transportation circumstances or requirements but has concluded that this privilege needs to be withheld from NVOCCs to preclude those NVOCCs from engaging in anti-competitive conduct, which the Commission believes might be exempt from the antitrust laws because of the Commission's proposed Section 16 exemption from tariff publication requirements.

For the reasons shown below, it is ISA's position that removal of the proposed prohibition against shipper NVOCCs contracting with carrier NVOCCs would not result in immunity from the antitrust laws; that the proposed restriction does not prohibit the collusive NVOCC conduct that primarily concerns the Commission; and if the Commission still is concerned about collusive conduct by NVOCCs, it can terminate the use of the NSA exemption by any NVOCCs guilty of such collusive conduct. We submit that it is not necessary to withhold the benefits of NSAs from specialized household goods NVOCCs and their customers or their shippers' association, here ISA acting on their behalf, for the Commission to achieve its objective.

**The Commission's Conclusion that the Proposed Exemption Might Immunize Collusion by Two or More NVOCCs from the Antitrust Laws is Not Supported by the Terms of Section 7(A) (2) (B) of the Act.**

The principal reason stated by the Commission for prohibiting NVOCCs from entering into NSAs as shippers is the Commission's opinion that the proposed exemption of NVOCCs from the tariff publication requirements may automatically exempt from the antitrust laws collusion by two or more NVOCCs as to rates and services. (NPR, pp. 9-10).<sup>3]</sup> For this conclusion, the Commission relies on Section 7(a) (2) (B) of the Act, 46 U.S.C. App. §1706(a) (2) (B), which provides:

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3. The reference "NPR" is the Commission's Notice of Proposed Rulemaking.

“The antitrust laws do not apply to—

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(2) any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that... (B) it is exempt under section 1715 of this title from any filing or publication requirement of this chapter.

We note that the Commission does not make a specific finding to support its opinion that should the Commission authorize NVOCCs to enter into NSAs, Section 7(a) (2) (B) would automatically immunize the NVOCCs from antitrust enforcement action by the Justice Department for price-fixing or other collusive activities. Not only does the Commission not make such a specific finding, but a reading of the NPR reveals that the Commission has doubts that the limited exemption from tariff publication would, without the proposed restriction, immunize NVOCCs from prosecution for unlawful collusive activities.

The Commission’s doubt is evident from the following statements:

“It could be argued... that such activity would therefore be exempt from the antitrust laws. This would mean that NSAs offered by two or more NVOCCs, acting in concert would enjoy immunity from antitrust enforcement.” (NPR, p. 9). (Emphasis supplied).

“... allowing two or more unrelated NVOCCs to offer NSAs in concert could present significant impediments to competition, as NVOCCs would be permitted to collude without oversight of...the Department of Justice.” (NPR, p. 9). (Emphasis supplied).

As to two NVOCCs entering into an NSA, one as a shipper and the other as a carrier, the Commission likewise expresses doubt as to whether collusion would be immune from the other antitrust laws. The Commission states:

“Under Tucor, the immunity would likely be interpreted to include an NSA entered into between an NVOCC acting as a carrier and an NVOCC acting as a shipper.” (NPR, p. 10) (Emphasis supplied).

Due to the Commission’s obvious uncertainty that Section 7(a) (2) (B) would confer antitrust immunity without the proposed restriction and for the other reasons stated below, we request that the Commission present this matter to the Department of Justice, the agency entrusted with antitrust enforcement, for its opinion on whether Section 7(a) (2) (B) would exempt NVOCCs from the antitrust laws before depriving NVOCCs, particularly household goods NVOCCs and their shippers’ association, from the benefits of NSAs accorded other shippers.

We submit that there is ample reason to doubt the Commission’s suggestion that Section 7(a) (2) (B) immunizes from DOJ enforcement price-fixing or other collusion by NVOCCs acting either as carriers or shippers, or both.

First, we maintain that the decision in United States v. Tucor, 189 F.3d 834 (9<sup>th</sup> Cir. 1999), does not support the Commission’s finding that antitrust immunity under Section 7(a) (2) (B) would apply. The Court in the Tucor decision does not cite, discuss or apply Section 7(a) (2) (B). Tucor involved only Section 7 (a) (4) which exemption is limited to anti-competitive agreements or activity relating to



inland transportation in a foreign country when provided as part of through transportation in a United States import or export trade. The Court held price-fixing between two foreign motor carriers was exempt from the antitrust laws under the specific terms of Section 7(a) (4). The decision is wholly inapposite on its facts and does not support the Commission's restriction against NVOCCs participating in NSAs.<sup>41</sup>

Second, the Commission's finding that there may be collusion in an NSA that would violate the antitrust law by an NVOCC as a shipper and an NVOCC as a carrier is also unsupportable. The Commission states:

“It is possible that NVOCCs could affect shipping rates through collusive arrangements in which one NVOCC is characterized as a carrier and the other is characterized as a shipper. Authorizing a mechanism by which they could collude on price, free from antitrust enforcement, could result in a substantial reduction in competition: 46 U.S.C. App. §1715.” (NPR, p. 10).

The Commission does not describe the collusive arrangement that it envisions could result from an NVOCC entering into an NSA as a shipper with another NVOCC to arrange for movement of shipments. We do not foresee how NVOCC parties to a single NSA would engage in collusion that would violate the antitrust laws. Section 7(a) (2) (B), by its terms, grants relief from the antitrust laws only for activity exempted by the Commission from the statutory requirements of filing

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4. We note that holding has been appealed by the Department of Justice to the Fourth Circuit in United States of America v. Gosselin World Wide Moving N.V. and the Pasha Group. (2004).

agreements or publishing tariffs. It does not immunize collusion by NVOCCs acting in any capacity and therefore does not exempt from the antitrust laws collusive actions which would otherwise violate the antitrust laws. Further, the antitrust immunity under Section 7(a) (2) (B) is limited to activity within the Commission's jurisdiction under the Shipping Act, viz., activity which is permitted or prohibited by the Act. Collusion between NVOCCs is clearly beyond the jurisdiction of the Commission. If such collusion is unlawful, the elimination of such conduct is the responsibility of the Department of Justice and not the Commission. Therefore, absent any determination by the Department of Justice that collusive activity undertaken by NVOCCs acting as carriers or shippers, or both, is exempt from the reach of the antitrust laws, we respectfully submit that the Commission's rule should be issued on the assumption that it is not.

As to the Commission's concern that an NSA between two NVOCCs "could affect shipping rates",<sup>5]</sup> our response is that the otherwise applicable tariff rates prevent two NVOCCs from providing for higher than tariff rates in an NSA.

We maintain that, as in the case of service contracts, NSAs between NVOCCs would result in lower rates for beneficial owners and other shippers and therefore would be pro-competitive rather than anti-competitive. It would permit small NVOCCs to aggregate their tonnage with large NVOCCs, which in turn will

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5. The only adverse impact on shippers, assumed to be of concern to the Commission, is high, not low shipping rates.

be able to obtain the lowest rates from vessel operators to the economic benefit of all parties and in furtherance of the policy of the Ocean Shipping Reform Act (OSRA) to promote “competitive and efficient ocean transportation” by placing a “greater reliance on the marketplace.” (46 U.S.C. App. §1701(4)).

Third, we maintain the Commission’s conclusion that collusion by two more NVOCCs as carriers in offering their separate NSAs would be immune from the antitrust laws is contradicted by the clear limitation contained in the Commission’s exemption, Section 531.2. The exemption provides for an individual NVOCC to offer a shipper a rate in an NSA which rate is not required to be published in that NVOCC’s tariff. By its terms, this limited exemption from tariff publication exempts NVOCCs on an individual basis and does not exempt concerted price-fixing by two or more NVOCCs acting jointly.

It is clear that the scope of the antitrust exemption can be no broader than that of the Commission’s exemption. By its terms, Section 7(a) (2) (B) only exempts activity undertaken or entered into with “a reasonable basis to conclude” that it is exempt from “any filing or publication requirement of this Act.” There is no reasonable basis for concluding that by exempting an individual NVOCC from publishing its rates, the Commission has conferred protection on two or more NVOCCs engaged in price-fixing from prosecution under the antitrust laws.

Further, as previously pointed out, Section 7(a) (2) (B) requires that the activity exempted from the antitrust laws must be activity either “permitted or

prohibited” under the Act, in other words, within the jurisdiction of the Commission. Although the Shipping Act authorizes vessel operators to “discuss, fix or regulate transportation rates”,<sup>61</sup> it does not authorize the Commission to permit NVOCCs to engage in price-fixing. As a result, the clear and specific language of Section 7(a) (2) (B) establishes that the Commission’s Section 16 exemption would not immunize price-fixing by NVOCCs from the antitrust laws.

For these reasons, we maintain that the Commission’s proposed rule to allow an individual NVOCC to offer an NSA by exempting its rates from tariff publication does not trigger an antitrust exemption for collusive price-fixing by two or more NVOCCs in either a carrier-to-carrier or shipper-to-carrier relationship.

The Restriction to Exclude NVOCCs as Shippers Will Not Prevent Collusion by NVOCCs as Carriers.

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We maintain that the Commission’s proposed exclusion of NVOCCs from participating in NSAs as shippers will not prevent collusion as to rates and services by NVOCCs, as carriers, which is the primary evil the Commission states that it wants to preclude. The Commission states:

“The proposed regulation specifically does not permit two or more NVOCCs to offer NSAs in concert, as there is reason for concern that doing so may cause substantial reduction in competition due to the inability of either the Department of Justice under the antitrust laws or the Commission under the Shipping Act to oversee such concerted behavior....This would mean that NSAs offered by two or more

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6. Section 4(a) (1), 46 U.S.C. App. §1703(a) (1).

NVOCCs, acting in concert would enjoy immunity from antitrust enforcement even though their collusive activity is not monitored by the Commission...In addition, we believe that the prohibitions of section 10(c) were intended to apply only to coordination between ocean common carriers....Therefore, allowing two or more unrelated NVOCCs to offer NSAs in concert could present significant impediments to competition, as NVOCCs would be permitted to collude without the oversight of the Commission or the Department of Justice.” (NPR, p. 9).

Since the proposed restriction, by its terms, is limited to actions by NVOCCs in a shipper-carrier relationship, it cannot reasonably be justified on collusive activities by NVOCCs in their carrier capacities. The exclusion of NVOCCs and their shippers’ associations from participating in NSAs as shippers does not in any way preclude NVOCCs as carriers from price-fixing or engaging in any other collusive activity.

The Commission’s Concern about NVOCCs Colluding Without Oversight by the Commission Could be Eliminated by Conditioning the Rule to Reserve the Right to Revoke the Exemption for NVOCCs Whose Actions under NSAs are Found to Reduce Competition or be Detrimental to Commerce.

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We suggest that should the Commission nevertheless maintain a concern that without the restriction there would be no oversight over improper actions of NVOCCs under NSAs, the Commission may condition the exemption so as to be able to revoke the exemption of any NVOCCs whose actions under an NSA are found to substantially reduce competition or be detrimental to commerce, the basis advanced for the issuance of the Section 16 exemption. Such a condition would allow small NVOCCs to obtain the benefit of NSAs while specifically preserving

Commission oversight over their actions and would make the proposed restriction unnecessary.

We propose the following condition:

The exemption granted by this part may be revoked, in whole or in part, by the Commission should it determine, in its discretion, that activity by an NVOCC or group of NVOCCs under this exemption has, or will result in a substantial reduction in competition, or be detrimental to the commerce of the United States.

The Proposed Tariff Publication Exemption will Not Immunize Shippers' Associations from the Antitrust Laws.

We further maintain that the Commission's exemption of NVOCCs from the tariff publication requirements for the purpose of entering into NSAs will not immunize shippers' associations from enforcement of the antitrust laws should they engage in any prohibited activity. The exemption from tariff publication has no application to a shippers' association which does not publish a tariff. Since the Commission's tariff publication exemption is inapplicable to shippers' associations, there is no reasonable basis to conclude that any activity in which a shippers' association might engage as a shipper party to an NSA would be immune from antitrust enforcement as a result of the Commission's exemption. For this reason, we maintain that a shippers' association with NVOCC members, such as ISA, would not be immunized from the antitrust laws by reason of the proposed exemption and therefore there is no reason to prohibit NVOCC shippers' associations from being shipper parties to NSAs.

Alternatively, ISA Asks the Commission to Permit NVOCCs of Household Goods and their Shipper Associations to be Shipper Parties to NSAs.

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Alternatively, we request that the Commission authorize NVOCCs of household goods and their shippers' associations to enter into NSAs with other NVOCCs . As we have shown above, the characteristics of household goods shipping in the United States foreign trades are so different from the shipping of commercial cargo in the export and import trades and the manner in which the household goods industry operates is so unique that the Commission can make a limited exception to allow household goods NVOCCs to continue their present arrangements with general commodity NVOCCs, but under contract, rather than under tariff.

In the event that the Commission should adopt a restriction against two or more NVOCCs participating in NSAs, we propose the following exception to allow specialized household goods NVOCCs to participate in NSAs as shippers (changes underscored):

(m) NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is made, an NVOCC of household goods or a shippers' association. The term does not include NVOCCs (other than NVOCCs of household goods) or a shippers association whose membership includes NVOCCs of cargo other than household goods.

## CONCLUSION

It is clear that the Commission's proposed rule permitting NVOCCs to enter into the equivalent of service contracts, presently in wide-spread use by shippers and vessel-operating carriers, is pro-competitive, is in the interest of the maritime commerce of the United States and should be adopted. However, we submit that this transportation benefit should not be withheld from NVOCCs who are too small to have the volume necessary to obtain competitive service contracts from vessel-operating carriers.

It is clear that the restriction against contracts between NVOCCs is included in the proposed rule because the Commission believed that the proposed rule without the restriction might exempt collusive conduct by NVOCCs from the reach of the antitrust laws. For the reasons set forth above, we firmly believe that issuance of the proposed rule without the restriction will not immunize NVOCCs who are guilty of collusive conduct from the antitrust laws. Should the Commission disagree, we suggest that this question be submitted to the Department of Justice to obtain its view. Further we respectfully state that the restriction against NVOCC service agreements should not be adopted absent an unequivocal finding that the restriction is necessary to avoid immunization of collusive conduct by NVOCCs from the antitrust laws.




In the alternative, we ask again for reasons stated above, that the Commission modify its proposed rule so that specialized NVOCCs engaged in the forwarding of household goods and personal effects are not prohibited from entering into NSAs with other NVOCCs to which they presently tender shipments to get the benefit of lower tariff rates for the benefit of their customers, individual householders.

Respectfully submitted,

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